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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1884 OF 2007

Mr. Vinodkumar Agarwal,
Agarwal House, 2nd Floor,
45, Yeshwant Colony,
Indore 452 001 (M.P.) ... Petitioner

Versus

1.Union of India,
(through the Joint Secretary,
Ministry of Law, Justice and
Company Affairs), Ayakar Bhawan,
MK Road, Churchgate, Mumbai 400 020

2. Central Board of Excise & Customs,
a Board constituted under the Central
Board of Revenue Act, 1963, having
its office at North Block,
New Delhi.

3. The Compounding Authority,
Mumbai, Customs Zone 1 having its office
at New Customs House, Ballard Estate,
Mumbai 400 001. ... Respondents

Mr. Vikram Nankani with Mr. Madhur Baya for Petitioner.

Dr.(Mrs) Purnima Advani with Mr.Y.S. Bhate and Mr. N.V. Masurkar and Mr. D.A. Dubey and Mr.H.P.Chaturvedi for Respondents.

CORAM: F.I. REBELLO &
J.P. DEVADHAR, JJ.
DATED: OCTOBER 25, 2007

ORAL JUDGMENT (Per F.I. Rebello,J.):

1. Rule. Heard forthwith.

2. The Petitioner is engaged in the business of export of garments, brassware, machinery and

machinery parts as a partner of M/s. Agarwal Overseas Corporation. The Petitioner is also the Managing Director of M/s. Admanum Finance Limited, a company incorporated under the Companies Act, 1956 and engaged inter alia in the purchase, leasing and financing of vehicles and export of various manufactured goods. A show cause notice was issued amongst others to the Petitioner on 31.5.1999 for illegally exporting of bicycle parts. Pursuant to the show cause notice and the proceedings thereto an order came to be passed on 29.9.2000 against M/s. Agarwal Overseas Corporation and M/s. Admanum Finance Limited. Parties aggrieved have prefererd an appeal.

3. A criminal case bearing No. 29/CW/04 has been registered against the Petitioner and one M/s. Shah Mohamad Mukhia in the court of Chief Metropolitan Magistrate, Esplanade, Mumbai under Section 135(1)(ii) of the Customs Act, 1962 and Section 120B of the Indian Penal Code, 1860. The petitioner on 12.11.2006 made an application before the Compounding Autority for compounding of offences as set out in the complaint dated 13.2.2004 under the Customs (Compounding Offences) Rules, 2005. The Respondent No. 3 as the Compounding Authority, without dealing with the various arguments advanced by the petitioner rejected the application only on

the basis of instructions contained in the CBEC Circular No. 54/2005-Cus dated 30.12.2005. That circular sets out that the Compounding Authority shall reject all applications where alongwith an offence under the Customs Act, any offence is alleged to have been committed under the Indian Penal Code, 1860. The Petitioner by the present Petition has challenged the circular dated 30.12.2005 and has also sought a mandamus to direct Respondent No. 2, the Central Board of Excise and Customs to withdraw the circular dated 30.12.2005. Though no relief has been sought for quashing the order rejecting the application for compounding of the offences, relief has been sought to decide the Petitioners' application for compounding without being influenced by the circular dated 30.12.2005.

4. On behalf of the Petitioner, it is submitted that the impugned circular is without authority of law and in excess of powers conferred under Section 151A of the Act. Under Section 151A of the Customs Act, 1962 (hereinafter referred to as the Act) the board may issue instructions only for the purpose of uniformity in classification of goods or with respect to levy of customs duty. The Board, it is therefore, submitted cannot issue any directions for any purposes other than the power conferred under by Section 151A to Control the exercise of statutory

power by the Officers under the Act more so in their quasi judicial capacity. It is next submitted that the impugned circular is also contrary to the provisions of Section 137(3) of the Act inas much as the Act provides for compounding of offences under the Customs Act either before or after the initiation of prosecution. The Act does not prohibit the exercise of power even if the case involves an offences under the Indian Penal Code or any other Act. It is submitted that the said circular is ultra vires the provisions of Section 137(3) of the Act and the rules framed thereunder which hereinafter are described as the "Compounding Rules".

. On behalf of the Respondents, an affidavit has been filed by Shri. Pitamber Bagh, the Assistant Commissioner of Customs opposing the grant of relief to the Petitioners. It is set out that the Circular No. 54/2005-Cus dated 30.12.2005, issued by the CBEC is not in derogation of the powers conferred on the Commissioner of Customs by Section 151A of the Customs Act, 1962. Section 151A contemplate the issue of directions to the officers to bring uniformity with regard to the classification of goods and levy of duty. It cannnot be equated with the guide lines issued under Circular No. 54/2005-Cus dated 30th December, 2005 wherein

reasonable restrictions are laid down for not considering the Applications for compounding of cases if the Applicant falls under the categories mentioned in the said circular. The Compounding authority has acted based on the circular and has then rightly passed the said order.

5. The Compounding authority, which was considering the application of the petitioner for compounding the offences after noting the contentions held that there is charge of criminal conspiracy against the Petitioner under Section 120B of the Indian Penal Code, 1860 and considering the CBDT circular, the case was covered by that circular and as such could not be compounded. The Petitioner’s contention was that notification 114/05 dated 30.12.2005 does not restrict the power of the Chief Commissioner for compounding the offences and that the Board’s circular cannot take away such discretionary powers available with the Chief Commissioner. The contentions urged on behalf of the Petitioner were rejected. The Compounding authority relied on Para 3 of the Circular and accordingly rejected the application for compounding.

6. The questions that arise for consideration are two fold. One is the notification of the Central Board of the Excise and Customs ultra vires section

137(3) and the Rules framed there under. Second is the impugned notification being Circular No. 54-05-cus dated 30.12.2005 issued by the Central board of Excise and Customs within the powers conferred on it under Section 151A of the Customs Act and if not so, is there any other provisions whereby such direction could have been issued by the Central Board of Excise and Customs.

7. We shall first deal with the first contention. For that purpose, we may gainfully reproduce the provisions of Section 137 of the Customs Act which read as under :

> "137. (1) No court shall take cognizance of any offence under section 32, section 133, section 134 or section 135 or section 135A except with the previous sanction of the Commissioner of Customs.
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> (2) No court shall take cognizance of any offence under section 136 :- (a) where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government.

(b) where the offence is alleged to have been committed by an officer of customs lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Commissioner of Customs.

(3) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Customs on payment, by the person accused of the offence to the Central Government by such compound amount as may be specified by rules. "

. A perusal of the section indicates, that the Court cannot take cognizance of the offences under Section 132, 133, 134 and 135 or section 135A except as to previous sanction of the Commissioner of Customs. Sub Section (3) is relevant in the context that any offences under Chapter XVI either before or after the initiation of the prosecution can be compounded by the Chief Commissioner of Customs, on payment by the person accused of the offences to the Central Government of such amount as may be specified by the rules. The power to compound an offence under the Act is therefore, of the Chief Commissioner of Customs. The compounding amount would be as may be specified by the rules. The

discretion, therefore is of the Chief Commissioner to either compound the offence or not to compound the offence. If the Chief Commissioner exercises his discretion to compound the offence, then the compounding amount would be in terms of the rules framed. Section 137 only confers power on the Chief Commissioner, in respect of only those offences which are offences under Chapter XVI of the Customs Act. In other words, if there be offences other than those under the Customs Act, that would be beyond the jurisdiction of the Chief Commissioner of Customs and that would be governed by the general Law of compounding of offences depending upon the nature of the offence and would be the power normally of a court of Law. Thus, if in the course of import or export apart from the violation of the provisions of the Customs Act there are violations of any other provisions of law, then no power has been conferred on the Chief Commissioner of Customs to compound those offences under this Act. The power conferred therefore, is limited to the offences under the provisions of the Customs Act alone. What would be the effect of compounding offences under the Customs Act, and pending criminal proceedings, before the judicial forum need not be gone into as that would be power on that judicial forum to decide whether on compounding of the offence under Customs Act, the material on record

would led to framing of charges under any other Act or if charge is framed whether the accused before it can be discharged or acquitted of the offences charged. The effect of compounding of offences under the provisions of the Customs Act cannot therefore, result in an accused being discharged of offence under other Acts, like Indian Penal Code, merely because the offence under the Customs Act has been compounded. Section 137, therefore, clearly restricts the power of the Commissioner to compound offences only under the Customs Act and which fall under Chapter XVI.

8. Pursuant to the power conferred by Section 137(3), the delegate, Government of India, in exercise of its powers under Section 156 has made rules which are known as Customs (Compounding of offences) Rules, 2005. The said rules provide for the manner of making an application, procedure to be followed in respect of an application and the time limit within which the compounding can be done. Also Rule 5 provides for the compounding amount in respect of various offences compoundable under the Act. It may be material to note, that in so far as Section 136 is concerned, no rules have been made for compounding of offences by customs officers under Section 136 of the Act. It is therefore, only in the matter of imports and exports and persons

connected therewith whose application for compounding offence under Section 132, 133, 134, 35 and 135(1)(c), 135(1)(h), 135(1)(i) and 135A to the extent of said sections, which alone can be considered. The delegate has also chosen not to make any provision for compounding of offence under Section 135(1)(d). Rule 6 of the Rules confers on the compounding authority power to grant immunity from prosecution in respect of those cases which can be compounded. The issue whether such rule can be made pursuant to power under Section 137(3) is not before us. At any rate the rule is made by the delegate in exercise of the power under Section 137(3).

9. We now come to the guidelines for compounding of the offences issued by the Central Board for Excise and Customs by their Circular No. 54/05-Cus dated 30.12.2005. We may extract the following :

> "2. As you may be aware, the purpose of compounding offences against the payment of compounding amount is to prevent litigation and encourage early settlement of disputes. Considering the wide range of offences listed in the relevant Chapter of the Customs Act/Central Excise Act, Board has decided to classify these offences as (i)

technical offences, and (ii) substantive or non-technical offences for the purpose of compounding. 'Technical offences' are those offences that can be compounded more than once and would be accorded more liberal treatment. However 'substantive or non-technical offence' are offences, where it has been decided not to allow compounding for the second time. For the purpose of compounding, 'Substatntive or non-techncial offence' would mean offences covered under section 135 and 135A of the Customs Act. Similarly under Central Excise Act this would refer to offences covered under sub section (1)(a), (1)(b), (1)(bb), (1)(bbb), (1) (bbbb) and (1)(c) of section 9. On the other hand, 'Technical offence' would mean offences covered under section 132, 133, 134 of the Customs Act and section 9(1)(d) of the Central Excise Act. Accordingly compound for substantive offence shall be allowed only once.

3. It has also been decided by the Board, that considering the serious implications of certain offences mentioned below, these shall not be considered for compounding and any applications received from one of more

categories of the following persons should be rejected.

(i) Any person who along with offence under Customs Act, has also committed or has also been accused of committing an offence under any of the following Acts:

(a) Narcotics Drugs and Psychotropic Substances Act, 19785; (b) Chemical Weapons Convention Act, 2000; (c) Arms Act. 1959 (d) Indian Penal Code (e) The Wild Life (Protection) Act, 1972.

(ii) Any person who is involved in case of smuggling of goods falling under any of the following categories : (a) Special Chemicals, Organisms, Materials, equipments & Technologies (SCOMET), as specified in Appendix 3 to Schedule 2 of ITC (HS); (b) Prohibited items for import or export as specified in the ITC (HS) Classifications of Export and Import items, 2004-09 issued under section 3 of the Foreign Trade (Development and Regulation) Act, 1992; (c) Any other goods or a document, which is likely to affect friendly relations with any foreign state or is derogatory to national

prestige.

(iii) Any person who has already exercised the option of compounding of an offence in respect of goods of value exceeding rupees one crore in the past.

(iv) Any person who has been convicted under the Act by an order issued subsequent to the date of publication of the Customs/Excise (Compounding of Offences) Rules, in the official gazette.

4. While the Compounding of offence Rules have been made as simple and unambiguous as possible, it would be worthwhile to clarify a few provisions as follows :

(i) Offence committed by officers of Customs/Central excise doe snot merit compounding as it is a matter between the State and its employee. Accordingly the definition of the applicant excludes the departmental officers.

(ii) As the Chief Commissioner has to decide about he eligibility of the applicant and allow compounding in respect of an

application filed before him on the basis of certain facts given by the applicant, it is provided for verification f such facts and call for any other facts or information available on record from the reporting officer.

5. The Chief Commissioner have been empowered to compound offences before or after filing of the complaint subject to the above general guidelines. While there would be no difficulty in cases where complaint has not been filed by the department, as regards existing cases pending in the court, the following procedure may be followed.NO such application for compounding shall be processed unless s the applicant within 30 days of filing such application, files an affidavit before the Court before whom such prosecution is pending undertaking to comply with the provisions of these rules and submit a copy of such affidavit to the compounding authority. ON receipt of such affidavit, the compounding authority shall examine the application in accordance with the above guide-lines and pass an appropriate order under sub rule (3) to rule 4. A copy of such order shall also be

forwarded to the Court. After payment of compounding amount as per the above order the reporting authority shall move an application before the said court informing about the compounding of offence and requesting the court to dispose of the case accordingly. if the court accepts the order of compounding of offence and disposes of the case, then the order of compounding authority becomes final. However, in cases where the Court rejects the request of the department for grant of immunity from prosecution by compounding of offences, then the compounding amount paid by the applicant as per order of the compounding authority shall be refunded to the applicant. "

10. The power of the Central Board of Excise and Customs to issue instructions to Officers of Customs is contained under Section 151A which reads as under :

"151A : Instructions to officers of customs - The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, issue such orders, instructions and

directions to officers of customs as it may deem fit and such officers of customs and all the other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board.

Provided that no such orders, instructions or directions shall be issued :

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner ; or

(b) so as to interfere with the discretion of the Collector of Customs (Appeals) in the exercise of his appellate functions. "

11. A perusal of the Section therefore indicates that this exercise is for the purpose of uniformity in the classification of goods or with respect to levy of duty thereon. There is no power conferred to interfere with the statutory power of the Chief Commissioner of Customs by Section 137(3) of the Customs Act. The exercise of power under section 151A is restricted to matters pertaining to classification of goods or levy of duty thereof.

Such power could not have been invoked to interfere with the exercise of discretion of the power of the chief Commissioner of Customs conferred by Parliament by virtue of section 137(3) of the Act. To that extent in our opinion, such circular cannot be referable to the power conferred under Section 151A of the Customs Act. To that extent para 2 of the said circular would clearly be contrary to the provisions of section 137(3) of the Compounding rules. In so far a as Para 3 is concerned, as has already been explained there is no power in the Chief Commissioner of Customs under section 137(3) to compound any of the offences under any other Act except offences as set out in Chapter XVI and in terms of the rules made thereunder and to the extent thereof. Sub paras (1) and (2) of Para (3) at the highest are only directions in the nature of information and cannot be said to be pursuant to powers as conferred under section 151A. Sub Para (i) and (ii) of Para 3 therefore, to the extent that these are basically informative and do not interfere with the discretion conferred on the Chief Commissioner of Customs and at any rate are not of binding character cannot be said to be ultra vires on the ground that they are contrary to section 137(3) of the Customs Act. In so far as sub paras (iii) and (iv) of Para 3, in our opinion the same would interfere with the exercise of discretion

conferred on the Chief Commissioner of Customs by Section 137(3) of the Customs Act and to that extent the sub paras (iii) and (iv) of Para 3 would clearly be ultra vires of section 137(3) and consequently would have to be declared as null and void. In so far as Para 4(i) is concerned, it merely clarifies the position of law as already set out by us, namely that the offences committed by officers of Customs/Central Excise do not merit compounding as it is a matter between the State and its employee. It is merely clarificatory.

. Para 4(ii) really does not interfere with the exercise conferred on the Commissioner of Customs and is also not referable to power under section 151 but is really in the nature of information. In so far as Para 5 is concerned, in our opinion, in the absence of government making any rules under section 156, it was not open to prescribe procedure for compounding of offence referable to the power under section 137(3). Para 5 is again merely procedural and does not affect the discretion of the officer conferred with the power. In respect of the proceedings which are pending before the Criminal court, it is for the criminal court to decide the effect of the order for compounding passed by the Chief Commissioner of Customs. If Para 5 is read merely as instructions and not fixing any procedure

which has effect of interfering with the judicial proceedings then to that extent in our opinion, it is not necessary to strike down para 5. Para 6, 7 and 8 in our opinion are merely in the nature of information and are not pursuant to exercise of powers under section 151A and do not interfere with the exercise of discretion conferred on the Chief Commissioner of Customs.

12. In the light of the above,

(1) The order dated 4.5.2007 is quashed and set aside. The matter is remanded back to the authority to consider the application and dispose of the same according to law.

. We make it clear that by so holding, the jurisdiction of Courts exercising criminal jurisdiction does not stand excluded as it is for the court or authorities under the related criminal laws including its procedure, to decide independently as to whether an offence still subsists for it to exercise or continue to exercise jurisdiction.

(2) Considering the statutory provisions of section 137(3) of the Act read with rules made under Section 156(2)(h) of the Customs Act, the CBDT circular to

the extent it is contrary to the Act and Rules is clearly without jurisdiction and or ultra vires and consequently Paragraphs 2, 3(iii) and (iv) are declared to be ultra vires Section 137(3) of the Customs Act.

. Rule made absolute accordingly. There shall be no order as to costs.

(J.P. DEVADHAR, J.) **(F.I.REBELLO, J.)**